

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9781

File: 20-388625; Reg: 18086977

7-ELEVEN, INC., FIROZ PYAR ALI, and GUL FIROZ KURLAWALA,
dba 7-Eleven Store #2136-23577C
1101 South Glendale Avenue, Glendale, CA 91205,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: July 25, 2019
Los Angeles, CA

ISSUED AUGUST 12, 2019

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc.,
Firoz Pyar Ali, and Gul Firoz Kurlawala,,

Respondent: Joseph J. Scoleri III, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Firoz Pyar Ali, and Gul Firoz Kurlawala, doing business as 7-Eleven Store #2136-23577C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 5 days because their clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated December 6, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 2002. There is no record of prior departmental discipline against the license.

On May 29, 2018, the Department filed a single-count accusation against appellants charging that, on February 17, 2018, appellants' clerk, Jose Antezana (the clerk), sold an alcoholic beverage to 18-year-old Ariana Garnica (the decoy). Although not noted in the accusation, the decoy was working for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 2, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Charlotte Clark. Appellants presented no witnesses.

Testimony established that on February 17, 2018, Agent Clark entered the licensed premises in an undercover capacity, followed shortly thereafter by the decoy. The decoy went to the coolers where she selected a 25-ounce can of Bud Light beer. She took the beer to the sales counter and the clerk asked to see her identification. The decoy handed the clerk her California identification card, which contained her correct date of birth, showing her to be 18 years of age, and a red stripe indicating "AGE 21 IN 2020." (Exh. 2.) The clerk looked at the ID, handed it back, then completed the sale.

The decoy exited the store and met with Agent Clark and two other Department agents. They all then re-entered the premises. Agent Clark identified herself to the clerk and asked him to move to the end of the counter, which he did. She then asked the decoy to identify the person who sold her the beer. The decoy pointed at the clerk and said that he had. The two of them were standing three to five feet apart and facing

each other at the time. A photograph of the two of them was taken (exh. 3) and the clerk was subsequently cited.

The administrative law judge (ALJ) issued a proposed decision on October 11, 2018, sustaining the accusation and recommending a 5 day suspension. The Department adopted the proposed decision in its entirety on December 3, 2018, and a Certificate of Decision was issued on December 6, 2018.

Appellants then filed a timely appeal contending the ALJ's decision is not supported by substantial evidence because of the decoy's confidence and lack of nervousness which they maintain is not the demeanor which could generally be expected of an individual under 21 years of age — in violation of rule 141(b)(2).²

DISCUSSION

Appellants contend that the ALJ's decision is not supported by substantial evidence because "the decoy's confident demeanor and bearing was not one that could generally be expected of an individual under 21 years of age." (AOB at p. 2.) They maintain their position is supported by the fact that the decoy had participated in prior decoy operations, that she felt comfortable purchasing alcohol, and that she was not nervous during the decoy operation. (*Ibid.*)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain the police used a decoy in this case that failed to comply with the standards set forth in rule 141(b)(2). They argue that her prior experience as a decoy and lack of nervousness gave her a confident demeanor which was not one which could reasonably be expected of someone under age 21.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106

[28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance:

5. Garnica appeared and testified at the hearing. On February 17, 2017, she was 5' 6" tall and weighed 150 pounds. She wore a gray t-shirt, black pants, and black and white tennis shoes. Her hair was long, straight, and parted off to one side. Her hair had some blonde highlights at the tips. She was not wearing any jewelry or make-up. (Exhibits 3-5.) Her appearance at the hearing was the same, except that she was approximately 25 pounds heavier.

[¶ . . . ¶]

8. Garnica learned of the decoy program from Agent Clark. She had been a decoy two times before February 17, 2018. Each time she visited approximately 10 locations. On February 17, 2018, at least three and as many as five of these locations sold alcoholic beverages to her, including the Licensed Premises.

9. Garnica appeared her age—18—at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on February 17, 2018, Garnica displayed the appearance which could generally be

expected of a person under 21 years of age under the actual circumstances presented to Antezana.

(Findings of Fact, ¶¶ 5-9.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) argument:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Garnica had the appearance of a person over the age of 21. Among other things, they argued that she was not nervous while inside the Licensed Premises and had attempted to purchase alcohol at 30 locations during three decoy operations. This argument is rejected. There was nothing about Garnica's appearance which would make her appear old enough to legally purchase alcoholic beverages. Phrased another way, Garnica's appearance was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶ 5.) We concur with the ALJ's assessment.

Appellants argue that the decoy's confident demeanor and lack of nervousness — resulting from her experience as a decoy — gave her the appearance of a person over the age of 21. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

Confidence and lack of nervousness are simply not disqualifying characteristics for a decoy.

This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is

reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" or "nervous teenage" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 5-9, and Conclusions of Law paragraph 5, the ALJ found that the decoy met this standard.

Appellants argue that the Board's past decisions dictate reversal in this case because the Board previously found that:

The phrase "could generally be expected" clearly implies, as this board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21, but it also means that *most* people will believe that the decoy appears to be under 21.

(Quoting *7-Eleven/Dianne Corp.* (2002) AB-7835 at p. 6, emphasis in original.) While the "most people" standard may have been the position of the Board in 2002, it simply does not state the controlling law on rule 141(b)(2). In a similar minor decoy case, where the Court of Appeal was tasked with assessing whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1087[127 Cal.Rptr.2d 652].) The instant case is no different. Even if we disagreed with the ALJ's assessment of the decoy's appearance, we do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded

otherwise.” (*Ibid.*) As stated above, case law instructs us that when, as here, “two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department’s decision” (*Kirby, supra.*)

Ultimately, appellants are asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.